STATE OF MICHIGAN
IN THE SUPREME COURT
Appeal from the Michigan Court of Appeals
[Jansen, P.J. and Cavanagh and Gleicher, J.J.]

In re Estate of OLIVE RASMER.

DEPARTMENT OF HEALTH AND HUMAN SERVICES,

Plaintiff-Appellee,

vs

RICHARD RASMER, Personal Representative of the Estate of OLIVE RASMER,

Defendant-Appellant.

Supreme Court No. 153356
Court of Appeals No. 326642
Bay Probate Court
LC No. 14-049740-CZ

In re Estate of IRENE GORNEY.

DEPARTMENT OF HEALTH AND HUMAN SERVICES,

Plaintiff-Appellant,

v

ESTATE OF IRENE GORNEY,

Defendant-Appellee.

Supreme Court No. 153370
Court of Appeals No. 323090
Huron Probate Court
LC No. 13-039597-CZ

The appeal involves a ruling that a provision of the Constitution, a statute, rule or regulation, or other State governmental action is invalid.

In re Estate of WILLIAM B. FRENCH.

DEPARTMENT OF HEALTH AND HUMAN SERVICES,

Plaintiff-Appellant,

v

DANIEL GENE FRENCH, Personal Representative for the Estate of WILLIAM B. FRENCH,

Defendant-Appellee.

Supreme Court No. 153371
Court of Appeals No. 323185
Calhoun Probate Court
LC No. 2013-000992-CZ

In re Estate of WILMA KETCHUM.

DEPARTMENT OF HEALTH AND HUMAN SERVICES,

Plaintiff-Appellant,

v

ESTATE OF WILMA KETCHUM,

Defendant-Appellee.

Supreme Court No. 153372
Court of Appeals No. 323304
Clinton Probate Court
LC No. 14-28416-CZ

In re Estate of OLIVE RASMER.

DEPARTMENT OF HEALTH AND HUMAN SERVICES,

Plaintiff-Appellant,

v

RICHARD RASMER, Personal Representative of the Estate of OLIVE RASMER,

Defendant-Appellee.

Supreme Court No. 153373
Court of Appeals No. 326642
Bay Probate Court
LC No. 14-049740-CZ

BRIEF ON APPEAL OF APPELLANT MICHIGAN DEPARTMENT OF HEALTH AND HUMAN SERVICES IN DOCKET NOS. 153370-3

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STATEMENT OF JURISDICTION

On July 8, 2016, this Court granted Plaintiffs-Appellants Michigan Department of Health and Human Services' application for leave to appeal the February 4, 2016 opinion of the Court of Appeals. This Court has jurisdiction pursuant to MCL 600.232 and MCR 7.303(B)(1).

STATEMENT OF QUESTIONS PRESENTED

This Court's grant of cross-applications in this set of cases identified three questions presented. As appellant on two of the issues (questions 2 and 3), the Department's appellant's brief addresses those two issues here, and will address the question on which the Department is appellee (question 1) in its response to the Rasmer appellant's brief.

2. Whether implementation of the estate-recovery program by seeking recovery for pre-notification benefits violates procedural due process or substantive due process?

   Appellant's answer: No.

   Appellees' answer: Yes.

   Trial courts' answer: Yes, but limited to procedural due process.

   Court of Appeals' answer: Yes.

3. Whether a challenge to estate-recovery efforts under MCL 400.112g(4) is subject to judicial review?

   Appellant's answer: No.

   Appellees' answer: Yes.

   Trial courts' answer: The trial courts never addressed this issue.

   Court of Appeals' answer: Yes.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Fourteenth Amendment, § 1, U.S. Constitution

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law . . .

Article 1, § 17, of Michigan's 1963 Constitution

> No person shall . . . be deprived of life, liberty or property, without due process of law.

42 USC 1396p(b). Liens, adjustments and recoveries, and transfers of assets.

(b) Adjustment or recovery of medical assistance correctly paid under a State plan

(1) No adjustment or recovery of any medical assistance correctly paid on behalf of an individual under the State plan may be made, except that the State shall seek adjustment or recovery of any medical assistance correctly paid on behalf of an individual under the State plan in the case of the following individuals:

(A) In the case of an individual described in subsection (a)(1)(B) of this section, the State shall seek adjustment or recovery from the individual's estate or upon sale of the property subject to a lien imposed on account of medical assistance paid on behalf of the individual.

(B) In the case of an individual who was 55 years of age or older when the individual received such medical assistance, the State shall seek adjustment or recovery from the individual's estate, but only for medical assistance consisting of—

(i) nursing facility services, home and community-based services, and related hospital and prescription drug services, or

(ii) at the option of the State, any items or services under the State plan (but not including medical assistance for Medicare cost-sharing or for benefits described in section 1396a(a)(10)(E) of this title).

. . . .

MCL 400.112g. Michigan medicaid estate recovery program; establishment and operation by department of community health; development of voluntary estate preservation program; report; establishment of estate recovery program; waivers and approvals; duties of department; lien.

(1) Subject to section 112c(5), the department of community health shall establish and operate the Michigan medicaid estate recovery program to comply with requirements contained in section 1917 of title XIX. The department of community health shall work with the appropriate state and federal departments and agencies to review options for development of a voluntary estate preservation program. Beginning not later than 180 days after the effective date of the amendatory act that added this section and every 180 days thereafter, the department of community health shall submit a report to the senate and house appropriations subcommittees with jurisdiction over department of community health matters and the senate and house fiscal agencies regarding options for development of the estate preservation program.

(2) The department of community health shall establish an estate recovery program including various estate recovery program activities. These activities shall include, at a minimum, all of the following:

(a) Tracking assets and services of recipients of medical assistance that are subject to estate recovery.

(b) *Actions necessary to collect amounts subject to estate recovery for medical services as determined according to subsection (3)(a) provided to recipients identified in subsection (3)(b). Amounts subject to recovery shall not exceed the cost of providing the medical services. Any settlements shall take into account the best interests of the state and the spouse and heirs.*

(c) Other activities necessary to efficiently and effectively administer the program.

(3) The department of community health shall seek appropriate changes to the Michigan medicaid state plan and shall apply for any necessary waivers and approvals from the federal centers for medicare and medicaid services to implement the Michigan medicaid estate recovery program. The department of community health shall seek approval from the federal centers for medicare and medicaid regarding all of the following:

(a) Which medical services are subject to estate recovery under section 1917(b)(1)(B)(i) and (ii) of title XIX.

(b) Which recipients of medical assistance are subject to estate recovery under section 1917(a) and (b) of title XIX.

(c) Under what circumstances the program shall pursue recovery from the estates of spouses of recipients of medical assistance who are subject to estate recovery under section 1917(b)(2) of title XIX.

(d) What actions may be taken to obtain funds from the estates of recipients subject to recovery under section 1917 of title XIX, including notice and hearing procedures that may be pursued to contest actions taken under the Michigan medicaid estate recovery program.

(e) Under what circumstances the estates of medical assistance recipients will be exempt from the Michigan medicaid estate recovery program because of a hardship. At the time an individual enrolls in medicaid for long-term care services, the department of community health shall provide to the individual written materials explaining the process for applying for a waiver from estate recovery due to hardship. The department of community health shall develop a definition of hardship according to section 1917(b)(3) of title XIX that includes, but is not limited to, the following:

(i) An exemption for the portion of the value of the medical assistance recipient's homestead that is equal to or less than 50% of the average price of a home in the county in which the medicaid recipient's homestead is located as of the date of the medical assistance recipient's death.

(ii) An exemption for the portion of an estate that is the primary income-producing asset of survivors, including, but not limited to, a family farm or business.

(iii) A rebuttable presumption that no hardship exists if the hardship resulted from estate planning methods under which assets were diverted in order to avoid estate recovery.

(f) The circumstances under which the department of community health may review requests for exemptions and provide exemptions from the Michigan medicaid estate recovery program for cases that do not meet the definition of hardship developed by the department of community health.

(g) Implementing the provisions of section 1396p(b)(3) of title XIX to ensure that the heirs of persons subject to the Michigan medicaid estate recovery program will not be unreasonably harmed by the provisions of this program.

(4) *The department of community health shall not seek medicaid estate recovery if the costs of recovery exceed the amount of recovery available or if the recovery is not in the best economic interest of the state.*

(5) *The department of community health shall not implement a Michigan medicaid estate recovery program until approval by the federal government is obtained.*

(6) The department of community health shall not recover assets from the home of a medical assistance recipient if 1 or more of the following individuals are lawfully residing in that home:

(a) The medical assistance recipient's spouse.

(b) The medical assistance recipient's child who is under the age of 21 years, or is blind or permanently and totally disabled as defined in section 1614 of the social security act, 42 USC 1382c.

(c) The medical assistance recipient's caretaker relative who was residing in the medical assistance recipient's home for a period of at least 2 years immediately before the date of the medical assistance recipient's admission to a medical institution and who establishes that he or she provided care that permitted the medical assistance recipient to reside at home rather than in an institution. As used in this subdivision, "caretaker relative" means any relation by blood, marriage, or adoption who is within the fifth degree of kinship to the recipient.

(d) The medical assistance recipient's sibling who has an equity interest in the medical assistance recipient's home and who was residing in the medical assistance recipient's home for a period of at least 1 year immediately before the date of the individual's admission to a medical institution.

(7) The department of community health shall provide written information to individuals seeking medicaid eligibility for long-term care services describing the provisions of the Michigan medicaid estate recovery program, including, but not limited to, a statement that some or all of their estate may be recovered.

. . . . [Emphasis added.]

MCL 400.112k. Applicability of program to certain medical assistance recipients.

The Michigan medicaid estate recovery program shall only apply to medical assistance recipients *who began receiving medicaid long-term care services after the effective date of the amendatory act that added this section.* [Emphasis added.]

INTRODUCTION

Before these four decedents first enrolled in Medicaid long-term care (in 2008, 2009, and 2010), the Legislature in 2007 enacted estate recovery, MCL 400.112g, providing that the estates of all individuals who began receiving long-term care after September 2007 would be subject to recovery, MCL 400.112k, and required the Department to recover amounts paid for Medicaid services from the recipient's probate property. MCL 400.112h(a). Both that state statute and the federal Medicaid statute itself thus provided notice to the decedents before any of them enrolled for benefits that the benefits would be subject to estate recovery.

By ignoring this notice and the estate-recovery rules that were statutorily defined aspects of the Medicaid benefits, the Court of Appeals' decision created, over a dissent, a new due-process right to "coordinate [one's] need for healthcare services with [one's] desire to maintain [one's] estate[ ]," or a "right to elect whether to accept benefits and encumber [one's] estate[ ], or whether to make alternative healthcare arrangements." *In re Gorney Estate*, _ Mich App _ (2016); slip op, pp 9–10. But because the decedents had notice by virtue of the statutes themselves, they had the opportunity from the outset to make that very choice. What is more, when these decedents requested to *continue* receiving benefits at their annual eligibility redeterminations, their respective agents signed written acknowledgments agreeing that their estates would be subject to recovery. After these acknowledgements, none of the decedents made alternative arrangements to dispose of their property to avoid probate and estate recovery. Rather, they continued receiving thousands of taxpayer dollars while being aware that their estates would be subject to recovery.

Further, there is no property right to be immune from substantive, across-the-board changes to government-paid, public benefits and the conditions imposed on receiving them. This is because rights to public benefits such as Medicaid long-term care are defined entirely by the statutes creating them, regardless of when the decedents received individualized notice that their estates would be subject to recovery for the benefits paid by Michigan's taxpayers.

Put simply, procedural due process does not provide a constitutional right to evade legislative changes to the Medicaid program that mandated estate recovery before these decedents ever applied for benefits. See *Richardson v Belcher,* 404 US 78, 81 (1971) (Procedural due process does not "impose a constitutional limitation on the power of Congress to make substantive changes in the law of entitlement to public benefits."); *City of Detroit v Walker*, 445 Mich 682, 699 (1994) ("a mere expectation as may be based upon an anticipated continuance of the present general laws" is not a vested right). And after these decedents passed away, their estates received notice of recovery and the opportunity to be heard before the courts. They received all the process that was due to them.

As to substantive due process, the estates cannot "surmount the exceedingly high hurdle of demonstrating that the law is altogether *unreasonable*[.]" *AFT Michigan v State of Michigan*, 497 Mich 197, 248 (2015) (emphasis in original). The state enacted estate recovery to prevent the loss of federal funding for Medicaid—funds necessary to support low-income individuals. 42 USC 1396c; 42 CFR 430.35. Like healthcare benefits for public school employees, the state found it "fiscally

untenable" to continue allowing the taxpayers to fund the sky-rocketing costs of long-term care while those same recipients passed on inheritances. See *AFT Michigan*, 497 Mich at 248. There is nothing unreasonable in pursuing estate recovery to reimburse the state for the direct costs of these decedents' care, as is explicitly mandated by federal law for states participating in the Medicaid program.

In addition to the due-process violation, the Court of Appeals read into the statute that an estate may raise MCL 400.112g(4) as a judicial defense in the probate courts to prevent the Department from ever asserting an estate-recovery claim. But whether recovery is cost-effective or in the best economic interest of the state should be left to the Department's determination, because the judiciary should not be making policy decisions regarding the use of public funds.

In sum, the Due Process Clause simply does not does not preserve a property right to receive Medicaid long-term care benefits under a prior version of law to evade estate recovery. To hold contrary would effectively prevent the Legislature from making prospective changes to government-paid, public benefits and would ignore that these decedents knowingly failed to otherwise maintain their estates after receiving both statutory notice and an individualized estate-recovery notice. Their complaint is lodged in the expectation that the law is not subject to change such that they can sit on available rights. Accordingly, the Department respectfully requests that this Court reverse the Court of Appeals for the reasons stated by the dissent.

STATEMENT OF FACTS AND PROCEEDINGS

Background

These cases involve four decedents who received thousands of dollars from the state's Medicaid program during their lives: Irene Gorney, William French, Wilma Ketchum, and Olive Rasmer. Pursuant to federal mandate, the Department seeks to recover from their estates the cost of their long-term care since July 1, 2010. These cases were consolidated before the Court of Appeals because they involved nearly identical facts and legal issues. (Appellant's Appendix, pp 285a-286a.) The facts recited by the *Gorney* opinion are largely undisputed.

The statutory framework for the Medicaid program and estate recovery

"In 1965, Congress enacted Title XIX of the Social Security Act, commonly known as the Medicaid act. See 42 USC 1396 *et seq*. This statute created a cooperative program in which the federal government reimburses state governments for a portion of the costs to provide medical assistance to low-income individuals." *Mackey v Dep't of Human Services*, 289 Mich App 688, 693 (2010). In Michigan, the Department is the single state agency responsible for establishing and administrating Michigan's Medicaid program. MCL 400.105(1); 42 CFR 431.10(b)(1) (state plan must appoint a single state agency for Medicaid program).

In 1993, Congress required all states participating in Title XIX to implement Medicaid estate recovery. 42 USC 1396a(a)(18); 42 USC 1396p(b)(1). This is because "Medicaid [is] an entitlement program for the poor [and] should not facilitate the transfer of accumulated wealth from nursing home patients to their

non-dependent children." *Idaho Dep't Of Health & Welfare v McCormick*, 153 Idaho 468, 472 (2012) (quotations omitted). Although estate recovery has been a federal mandate since 1993, Michigan did not enact an estate-recovery program until 2007.

In 2007, the federal government threatened to stop federal funding for Michigan's Medicaid program because Michigan was the only remaining state that had not complied with 42 USC 1396p by enacting estate recovery. 42 USC 1396c; see also Senate Legislative Analysis, SB 374, September 28, 2007 ("*Michigan's Federal Medicaid share (over $5 billion annually) could be jeopardized if estate recovery is not implemented.* The Federal government has communicated to the State its intention to begin making use of this sanction for FY 2007-08 if estate recovery is not enacted.") (emphasis added).

In September 2007, our Legislature added MCL 400.112g through MCL 400.112k to the Social Welfare Act, MCL 400.1 *et seq*, to codify estate recovery for the first time. The statute was effective September 30, 2007. Before that time, however, state law did not provide that individuals receiving Medicaid did not have to repay Medicaid benefits after their death.

The Medicaid and estate-recovery programs are carried out pursuant to a state plan that requires federal approval. 42 USC 1396p; MCL 400.112g(5). On May 23, 2011, Michigan's initial state plan for estate recovery was finally approved by the federal Centers of Medicare and Medicaid Services (CMS). *In re Keyes Estate*, 310 Mich App 266, 268 (2015); see also Appellant's Appendix, pp 127a-139a.

The state plan was later amended in 2012; the amendments are not at issue here. (Appellant's Appendix, pp 140a-147a.)[1]

Under federal law, the effective date of Michigan's initial state plan was July 1, 2010—the first date of the calendar quarter was submitted. 42 CFR 447.256(c); 42 CFR 430.20; Appellant's Appendix, p 127a. Because the state plan was legally effective on July 1, 2010, the Department seeks to recover for benefits received after that date. Bridges Administrative Manual 120, p 8, attached as Appellant's Appendix, p 212a.[2] This is true even if one enrolls in Medicaid after September 30, 2007, when MCL 400.112g-k was effective, but before July 1, 2010.

Statutory notice and express acknowledgement of estate recovery

All of the decedents here began receiving Medicaid long-term care after the enactment of 42 USC 1396p in 1993 and of MCL 400.112g-k in September 2007. *Gorney*, slip op at 3 ("[T]he decedents began receiving Medicaid benefits after the September 30, 2007 passage of 2007 PA 74.").

More specifically the decedents here first applied to receive Medicaid benefits as follows:

- French – September 2008. (Appellant's Appendix, p 94a, ¶¶ 2-3.)
- Rasmer – 2009. (Appellant's Appendix, p 268a.)

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[1] Both the 2011 State Plan and the 2012 State Plan were exhibits submitted in each of these four cases, but are not reproduced for each case in Appellant's Appendix.

[2] The Department's policy manuals implementing the Medicaid program are found in the Bridges Administrative Manual and the Bridges Eligibility Manual, both of which are available online at http://www.mfia.state.mi.us/olmweb/ex/html.

- Gorney – September 2010. (Appellant's Appendix, p 34a, ¶ 7; 37a, ¶ 25.)
- Ketchum – October 2010. (Appellant's Appendix, p 174a, ¶ 1.)

However, Medicaid benefits do not involve a one-time application for all of time. This is because Medicaid benefits stop at the end of the 12-month benefit period from the last application, unless a renewal is completed. Bridges Administrative Manual 210, pp 2-3, attached as Appellant's Appendix, pp 124a-125a; 42 CFR 435.916(a). Thus, after these decedents' initial applications for Medicaid long-term care, the decedents, or their authorized representative, were annually required to complete an application to re-determine if they continued to be eligible for Medicaid—what is referred to as a DHS-4574 form. *Gorney*, slip op at 3; see also (Appellant's Appendix, p 36a ¶ 19; 112a ¶¶ 3-4; 115a ¶¶ 6-7; 175a ¶¶ 4-5; 180a ¶¶ 6-7; 279a ¶ 7.). The same form is generally used for initial eligibility and redetermination.

Beginning in October 2011, the DHS-4754 form included an estate-recovery notice. (Appellant's Appendix, p 36a ¶ 10.) In 2012, Gorney, French, and Ketchum completed the DHS-4574 form for their annual redetermination of eligibility. (Appellant's Appendix, pp 61a-70a; 114a-118a, 179a-191a.) Rasmer completed an annual redetermination in 2013. (Appellant's Appendix, p 264a.)

When these decedents, or their representatives, signed the redetermination application in 2012 or 2013, they elected to continue receiving benefits while also acknowledging receipt of the following notice providing that their estates would be subject to recovery:

> I understand that upon my death the Michigan Department of Community Health [now the DHHS] has the legal right to seek recovery from my estate for services paid by Medicaid. MDCH will not make a claim against the estate while there is a legal surviving spouse or a legal surviving child who is under the age of 21, blind, or disabled living in the home. An estate consists of real and personal property. Estate Recovery only applies to certain Medicaid recipients who received Medicaid after the implementation date of the program. MDCH may agree not to pursue recovery if an undue hardship exists. For further information regarding Estate Recovery call 1-877-791-0435. [Appellant's Appendix, pp 35a-36a; 122a; 192a-203a; 265a.[3]]

Notably, the estates do not dispute that these decedents received the above acknowledgment. (Appellant's Appendix, pp 36a ¶ 19; 112a ¶¶ 3-4; 115a ¶¶ 6-7; 175a ¶¶ 4-5; 279a ¶ 7.) Gorney signed her own redetermination application that provided the above acknowledgment. (Appellant's Appendix, p 36a ¶ 19.) The other three decedents had a legally authorized relative sign the Medicaid application on their behalf that included the above acknowledgment. (Appellant's Appendix, pp 112a-113a ¶¶ 2-4; 174a-175a ¶¶ 2-5; 278a-279a ¶¶ 6-8.)

But even after receiving the estate-recovery acknowledgment, these decedents, or their representatives, did not make other arrangements to dispose of their property. One such option that was available was to execute a ladybird deed to avoid probate and intentionally evade estate recovery. Frank, *Ladybird Deeds: Purposes and Usefulness*, 95 Mich B J 30, 32 (June 2016) ("Before or after qualifying

[3] The Medicaid DHS-4574 contains an acknowledgment form attached to the application that the applicant certifies that he or she has "received and reviewed." (Appellant's Appendix, pp 34a-35a, ¶¶ 10-14; 115a, ¶ 7; 180a, ¶ 7.) In all four cases, a blank Medicaid application was submitted that contained the acknowledgments with the estate-recovery paragraph to demonstrate the content of the information provided.

for Medicaid benefits, the [recipient] can execute and record the ladybird deed. The deed is a transfer-on-death document; therefore, the property does not become part of the probate estate, which currently exempts the property from Medicaid recovery proceedings."). The estates acknowledged that this was an option, but apparently the decedents failed to take that option to preserve their estates. See Appellant's Appendix, pp 42a-43a; 48a; 218a; 226a-227a. Consequently, upon their death, some of their property required probate administration and, therefore, required the Department to pursue estate recovery. MCL 400.112h(a) (recovery limited to probate property).

Since July 1, 2010, the effective date of the initial state plan for estate recovery, the decedents received from the state's Medicaid program the following amounts of government-paid, public benefits for their long-term care:

- Gorney - $143,301.23. (Appellant's Appendix, p 37a ¶ 26.)
- French - $155,363.13. (Appellant's Appendix, p 94a ¶ 6.)
- Ketchum - $129,703.63. (Appellant's Appendix, pp 171a ¶ 8; 230a.)
- Rasmer - $178,133.02. (Appellant's Appendix, p 268a.)

The Department is not seeking to recover benefits paid before July 1, 2010.

The personal representatives summarily disallow the Department's claims

After the death of each of these decedents, the Department filed a statement and proof of claim against their probate estates to seek recovery of the previously stated amounts as mandated by federal law. All of the personal representatives summarily disallowed the Department's estate-recovery claims. See e.g. Appellant's

Appendix, p 110a. This required the Department to commence civil actions against the personal representatives to allow the claims or face a permanent bar to recovery. MCL 700.3804(2); MCR 5.101(C)(2).

In each of these cases, the estates, or personal representatives, maintained that the Department failed to provide an initial enrollment notice regarding estate recovery pursuant to MCL 400.112g(3)(e), MCL 400.112g(7), or to both provisions, and that the failure to do so violated procedural due process. *Gorney*, slip op at 4; see Appellant's Appendix, pp 14a; 95a ¶¶ 15-16; 221a; 272a. These arguments are made despite the fact that the decedents actually received and signed the acknowledgments providing notice of estate recovery. Likewise, the Department provided information to the family about the hardship process after the Medicaid beneficiary died when the Department sent notice of intent to pursue estate recovery explaining the hardship application process. See e.g. Appellant's Appendix, p 106a.

Furthermore, all estates argued that the purported failure of notice under MCL 400.112g(3)(e), MCL 400.112g(7), or under both, violated procedural due process. (Appellant's Appendix, pp 18a-19a; 49a; 104a; 152a; 173a, ¶16.) None of these cases argued a violation of substantive due process before the probate courts. But Gorney's estate raised substantive due process for the first time on appeal and contrary to its position before the probate court. Compare Appellant's Appendix, p 31a ¶ 8, with Appellant's Appendix, pp 74a-76a.

Probate-court litigation to allow the claim

The probate courts all upheld the estates' disallowances of the Department's estate-recovery claims by holding that the Department failed to provide an initial-enrollment notice that the courts' found was mandatory under MCL 400.112g(3)(e), MCL 400.112g(7), or both—basically that individualized notice must be provided at initial Medicaid enrollment as a condition precedent for these estates to be subject to recovery.

The probate court in Gorney granted summary disposition for the estate barring pre-acknowledgment benefits, and following a bench trial, denied all post-acknowledgment benefits under the theory that MCL 400.112g(7) mandates an enrollment notice. (Appellant's Appendix, pp 28a-29a, 52a-55a, 71a-72a.)

But the probate court in Ketchum relied only on MCL 400.112g(3)(e) as mandating an initial enrollment notice to completely bar the Department's claim following summary disposition. (Appellant's Appendix, pp 233a-234a.)

In both French and Rasmer, however, the probate courts granted summary disposition for the estate because they found that both MCL 400.112g(3)(e) and (7) require an initial-enrollment notice. (Appellant's Appendix, pp 158a-159a, 282a-284a.)

As to the broad due-process challenges, all the probate courts except for Rasmer held that the purported failure to comply with MCL 400.112g(3)(e), MCL 400.112g(7), or both violated some sort of generic due-process right under procedural-due-process grounds. *Gorney*, slip op at 4; see Appellant's Appendix, pp 55a-56a; 161a-162a; 232a.

Additional arguments advanced by Ketchum's estate

In addition to these arguments, Ketchum's estate also argued that MCL 400.112g(4) should bar the Department's estate-recovery claim because the estate's anticipated attorney fees of litigating recovery might consume the entire value of the estate—resulting in a depletion of estate assets used to satisfy creditor claims. (Appellant's Appendix, pp 172a ¶ 15; 220a.) The probate court did not rule on this issue.

The personal representative for Ketchum's estate filed her first account on November 12, 2014, in the probate administration file that is not part of this appeal. The estate requested attorney fees in the amount of $11,062.92 be allowed—attorney fees incurred in preventing estate recovery. (Appellant's Appendix, pp 236a-237a.) The fees were in addition to other higher priority claims. MCL 700.3805. The personal representative's account demonstrating what assets are available for estate recovery was filed *after* the probate court granted summary disposition for the estate on August 5, 2014, regarding the Department's estate recovery claim.

The Department timely appealed these four decisions to the Court of Appeals.

The Court of Appeals' majority opinion

On May 20, 2015, the Court of Appeals granted the Department's request to consolidate these four cases. (Appellant's Appendix, pp 285a-286a.)

The Court of Appeals relied on its earlier decision in *Keyes* and rejected the estates' arguments that the Department failed to comply with the notice provisions

of MCL 400.112g(3)(e) and MCL 400.112g(7). *Gorney*, slip op at 5-6. Additionally, the Court of Appeals rejected the estates' procedural-due-process arguments based on the purported lack of notice. *Id.*; slip op at 8 ("The estates had the same opportunity to contest the estate recovery claims in the probate court, and therefore received the notice and opportunity to be heard required to satisfy due process.").

Nevertheless the Court of Appeals searched *Keyes*'s parameters for a due-process violation because the Court found that all four "estates erroneously identified the date on which their due process rights were violated." *Id.* Although all four estates apparently misidentified their arguments, the Court of Appeals created a due-process violation under its interpretation of the word "implement" in MCL 400.112g(5).

Using a dictionary, the Court of Appeals interpreted the word "implement" to mean "'[c]arry out, accomplish; *esp:* to give practical effect to and ensure of actual fulfillment by concrete measures" and "to provide instruments or means of expression for.'" *Id.*; slip op at 9. Based on this definition, the court held that

> the DHHS could not "implement" the MMERP [Michigan Medicaid estate recovery program] before the federal government approved it. The DHHS sought "to give practical effect" to its recovery plan by making it "effective" July 1, 2010. This violated MCL 400.112g(5). [*Gorney*, slip op at 8.]

While Michigan's state plan was approved by the federal government on May 23, 2011, its effective date based on federal regulations was July 1, 2010. 42 CFR 447.256(c); 42 CFR 430.20. Pursuant to federal regulation, the effective date is based on when the Department submitted the state plan amendment to CMS. 42 CFR 447.256(c). The Department did not begin pursuing estate recovery until after

the state plan was approved by the federal government. But in each case the Department sought recovery of benefits paid as of the effective date of the state plan amendment, which was July 1, 2010. Appellant's Appendix, p 212a.

The Court of Appeals found that pursuing recovery of amounts paid from the effective date of the state plan violates the right to dispose of one's property as an inheritance: "The decedents had a right to coordinate their need for healthcare services with their desire to maintain their estates." *Gorney*, slip op at 9. According to the court,

> By applying the recovery program retroactively to July 1, 2010, the Legislature deprived individuals of their right to elect whether to accept benefits and encumber their estates, or whether to make alternative healthcare arrangements. The Legislature impinged on the decedents' rights to dispose of their property. Despite that the DHHS does not try to recover until the individual's death, that person's property rights are hampered during his or her life. Between July 1, 2010, and July 1, 2011, the date on which the plan was actually "implement[ed]," the decedents lost the right to choose how to manage their property. Taking their property to recover costs expended between July 1, 2010 and plan implementation would therefore violate the decedents' rights to due process. [*Id.*; slip op at 10.]

In addition, the Court of Appeals invited litigation on whether the costs of recovery is in the best economic interests of the state under MCL 400.112g(5). Although the court acknowledged that the appellate argument of Ketchum's estate was cursory and never addressed by the trial court, it rejected the Department's policy that recovery is not subject to litigation. The court, however, never addressed the standards in the state plan amendment: "Recovery is considered cost-effective when the potential recovery amount of the estate exceeds the cost of filing the claim and any legal work dealing with the claim, or if the recovery amount is above a

$1,000 threshold." (Appellant's Appendix, p 144a); see also Medicaid State Plan, 1/1/16, available at http://www.mdch. state.mi.us/dch-medicaid/manuals/MichiganStatePlan/MichiganStatePlan.pdf) (accessed Sept. 30, 2016).

The Court of Appeals' partial dissent

The dissenting opinion concurred "with the majority's determinations that the notice provided in the redetermination application was statutorily sufficient, the lack of notice at the time of enrollment did not violate due process, and the estates did not have a due-process right to the continuation of a favorable Medicaid law." *Gorney*, slip op at 1 (Jansen, J., dissenting).

But the dissent rejected the argument that seeking recovery from the effective date of the Medicaid state plan violated due process. The dissent also concluded that trial courts should not review whether the cost of recovery is in the best economic interests of the state. *Id.*; slip op at 3-4 (Jansen, J., dissenting).

Regarding due process, the dissent concluded that the majority created a new right that is not protected by the Due Process Clause:

> I do not believe that the interest articulated by the majority constitutes a protected property interest. The *decedents were not deprived of the use and possession of their property during their lives*. See *Bonner*, 495 Mich at 226. In addition, the decedents were not deprived of the right to dispose of their property through transfer or sale since the decedents were not prevented from selling or transferring their property while they were alive. See *Loretto*, 458 US at 435. At most, the interest at stake can be characterized as the right to choose how to manage property or the right to make alternative healthcare arrangements instead of encumbering an estate. See *Id.* I conclude that *there is no existing rule or common understanding*

> *establishing the right to make alternative healthcare arrangements or the right to choose how to manage property*. See *Roth*, 408 US at 577. [*Gorney*, slip op at 3 (Jansen, J., dissenting) (emphasis added).]

Likewise, the dissent recognized that the majority was speculating on how the decedents would have disposed of their property. "Furthermore, even assuming that there is a due-process right that was violated when the DHHS applied the estate recovery program retroactively, the right is personal to the decedents, and it is impossible for the estates to know what alternative arrangements the decedents would have made." *Id.*; slip op at 4 (Jansen, J., dissenting).

The dissent also rejected that the Department's decision to pursue recovery consistent with MCL 400.112g(4) is reviewable by the trial courts because whether recovery is cost-effective and in the best interest of the state is left to the Department's determination. *Id.*

The Department timely filed an application for leave with this Court. On July 8, 2016, this Court granted the Department's application for leave, including a related issue raised by the application for leave by the Rasmer Estate. (Appellant's Appendix, p 301a.)

This Court asked the parties to address whether and to what extent

> (1) MCL 400.112g-k permit the plaintiff to seek estate recovery for medicaid services provided to an individual before that individual received notification of the estate-recovery program from the plaintiff; (2) estate recovery for such pre-notification services constitutes a violation of the individual's substantive and/or procedural due process rights; and (3) a challenge to the plaintiff's estate-recovery efforts under MCL 400.112g(4) is subject to judicial review. [Appellant's Appendix, p 302a.]

In this case, the Department is the appellee with respect to issue 1, but the appellant with respect to issues 2 and 3. Accordingly, this brief addresses issues 2 and 3, and the Department will address issue 1 in its appellee brief.

STANDARD OF REVIEW

This Court reviews de novo questions of constitutional law, such as whether a party has been afforded due process. *Bonner v City of Brighton*, 495 Mich 209, 221 (2014). In addition, this Court reviews de novo issues of statutory interpretation. *IBM v Dep't of Treasury*, 496 Mich 642, 647 (2014).

SUMMARY OF ARGUMENT

Estate recovery of pre-acknowledgement services does not violate substantive-or procedural-due-process rights because the Legislature established that these benefits would be subject to estate recovery before these four decedents ever applied for benefits. And estate recovery is appropriate because the Legislature in MCL 400.112g-k required the Department to seek recovery for benefits received once the state plan was implemented in 2010 and there is no statutory exception for benefits paid before implementation—federal law requires recovery for *any* medical assistance benefits correctly paid under the state plan.

Further, due process does not recognize a property right to receive government-paid, public benefits under a prior version of law. And in any event, these decedents received an individualized notice when they later reapplied for benefits which informed them that their estates would be subject to recovery for the

benefits they received. That the individualized notice was provided when they requested that their benefits continue does not offend due process because after receiving the notice, they elected to continue receiving benefits and did not otherwise dispose of their property or maintain their estates. The estates, therefore, cannot complain of a constitutional deprivation even if there was one.

Finally, whether the costs of recovery is in the best interest of the state is a matter delegated to agency determination, and judicial review is inappropriate. Individual judges should not be the gatekeepers by making policy decisions on when it is in the state's best economic interests to pursue recovery. And MCL 400.112g(4) does not contain any standards suited for judicial review. Absent an allegation of a constitutional violation, courts are not in a position to review the wisdom of the executive branch decision to pursue estate recovery in any particular case.

ARGUMENT

I. Implementing estate recovery does not violate procedural or substantive due process.

The Due Process Clauses of the U.S. and Michigan Constitutions guarantee that no person shall be deprived of "life, liberty, or property, without due process of law." U.S. Const, Am XIV, § 1; Const 1963, art 1, § 17. Because the four estates assert a generalized due-process violation and do not argue that Michigan's Due Process Clause should be interpreted any differently than the U.S. Constitution's Due Process Clause, this Court need "not seek to determine otherwise." *AFT Michigan v State of Michigan*, 497 Mich 197, 245 (2015).

"The core of due process is the right to notice and a meaningful opportunity to be heard." *LaChance v Erickson*, 522 US 262, 266 (1998); accord *Bonner*, 495 Mich at 235. Due process is a flexible concept and different situations may demand different procedural protections. *Mathews v Eldridge,* 424 US 319, 334 (1976).

Seeking recovery for Medicaid services does not offend due process because the very state and federal laws that provided the Medicaid benefits also made clear *before* these four decedents ever applied for the benefits that the State was required by law to seek estate recovery. Any delay in implementing estate recovery or in providing an *individualized* estate-recovery acknowledgment did not violate procedural or substantive due process either, because they were already on notice of the potential for estate recovery and therefore had the precise opportunity the Court of Appeals was concerned about: the opportunity to choose how to manage their property.

A. Before any of the decedents enrolled for long-term care benefits, they had statutory notice that any benefits they received could be subject to estate recovery.

The decedents in these cases first applied to receive Medicaid benefits in 2008, 2009, or 2010. (Appellant's Appendix, p 34a ¶ 7; 37a ¶ 25; 111a-112a ¶¶ 2-3; 174a ¶ 1; 268a.) In 2007, before any of those enrollments, both state and federal law put them on notice that if they decided to accept Medicaid benefits, that money would later be recovered from their estates. The Department's act of obeying those statutory commands to conduct estate recovery did not deprive any of the decedents of any procedural-due-process right.

Federal law in 2007 (dating back to 1993) made clear that States operating Medicaid plans were *required* to seek estate recovery for those who benefited from Medicaid by having it pay the costs for their medical care: "the State *shall* seek adjustment or recovery of any medical assistance correctly paid on behalf of an individual under the State plan . . . ." 42 USC 1396p(b)(1) (emphasis added); see also 42 USC 1396a(18) ("A State plan for medical assistance must . . . comply with the provisions of section 1396p of this title with respect to . . . recoveries of medical assistance correctly paid . . . .").

Michigan law in 2007—again, before any of the decedents enrolled in Medicaid—also provided that estate recovery would be required: "the department of community health shall establish and operate the Michigan medicaid estate recovery program to comply with requirements contained in [42 USC 1396p]." MCL 400.112g. Further, Michigan law in 2007 put the public on notice that estate recovery could apply to those who began receiving benefits after September 30, 2007: "The Michigan medicaid estate recovery program shall only apply to medical assistance recipients who began receiving medicaid long-term care services after the effective date of the amendatory act that added this section"—i.e., after September 30, 2007. MCL 400.112k. The foregoing facts establish that statutes existing when the decedents first applied to receive Medicaid benefits provided them with notice that they would be subject to estate recovery.

Multiple decisions of the U.S. Supreme Court establish that notice found in a statute suffices to meet the requirements of due process. *Grayden v Rhodes*, 345

F3d 1225, 1239 (CA 11, 2003) ("For one hundred years, the Supreme Court has declared that a publicly available statute may be sufficient to provide such notice because individuals are presumptively charged with knowledge of such a statute.").

For example, in *Reetz v People of State of Michigan*, 188 US 505 (1903), the U.S. Supreme Court rejected the argument that Michigan had violated a man's due-process rights by rejecting his application to register to practice medicine without giving him notice of when he could appear before the board of registration. *Id.* at 507, 509. Affirming this Court, the U.S. Supreme Court said simply, "The statute itself is sufficient notice." *Id.* at 509.

Similarly, in *Texaco, Inc v Short*, 454 US 516 (1982), the U.S. Supreme Court concluded that statutory notice satisfied the requirements of due process. In *Texaco*, the Court examined whether it violated due process for a state to deem a property owner's vested interest in mineral rights to have lapsed without giving the mineral owner notice and an opportunity to be heard. *Id.* at 524, 531. As the U.S. Supreme Court explained, "The first question raised is simply how a legislature must go about advising its citizens of actions that must be taken to avoid a valid rule of law," such as the rule "that a mineral interest that has not been used for 20 years will be deemed to be abandoned." *Id.* at 531. The Court's answer was equally simple: "Generally, a legislature need do nothing more than enact and publish the law, and afford the citizenry a reasonable opportunity to familiarize itself with its terms and to comply." *Id.* at 532; see also *City of Kentwood v Estate of Sommerdyke*, 458 Mich 642, 664 (1998) (citing *Texaco* for this proposition). "It is well

established," the Court continued, "that persons owning property within a State are charged with knowledge of relevant statutory provisions affecting the control or disposition of such property." *Texaco*, 454 US at 532. In short, statutory notice is sufficient for depriving someone even of a vested right in real property.

The concept of statutory notice is a basic premise of our democratic system: "The entire structure of our democratic government rests on the premise that the individual citizen is capable of informing himself about the particular policies that affect his destiny." *Atkins v Parker*, 472 US 115, 131 (1985). That is why the U.S. Supreme Court held in *Atkins* that a "congressional decision to the earned-income deduction from 20 percent to 8 percent" did not violate the notice requirements of due process. *Id.* at 130 ("'The legislative determination provides all the process that is due.'"); see also *Adams Outdoor Advertising v East Lansing* (*After Remand*), 463 Mich 17, 27 n 7 (2000) ("People are presumed to know the law.").

This reasoning is particularly compelling in this context, where the interest at stake is itself created by statute. Here, the same program (Medicaid) that authorized the provision of benefits to the decedents also informed them of the estate-recovery policy that would affect the destiny of any inheritance the decedents might have hoped to pass on to their estates. Their procedural-due-process claims based on lack of notice therefore fail: "The statute itself is sufficient notice." *Reetz*, 188 US at 509.

B. While the Medicaid benefits were more valuable in 2007 (when estate recovery was merely impending) than they were after July 2010 (when estate recovery was implemented), the decedents did not have any vested property right to continue receiving a higher level of benefits.

The Due Process Clause does not extend a property right to receive public benefits indefinitely without estate recovery. This Court has explained that individuals "have no constitutional right to receive any particular governmental benefits." *AFT Michigan*, 497 Mich at 225. Further, because estate recovery is part of the statutory scheme, it is a condition that is an integral limitation on the benefit. Thus, "[a]n individual is entitled to Medicaid if he fulfills the criteria established by the State in which he lives[and, the] State Medicaid plans must comply with requirements imposed both by the Act itself [i.e. 42 USC 1396 *et seq*] and by the Secretary of Health and Human Services." *Schweiker v Gray Panthers*, 453 US 34, 36–37 (1981). One such federal and state requirement is estate recovery. 42 USC 1396a(a)(18) (all state plans must include estate recovery).

The fact that the estates characterize their interest in Medicaid benefits as a "property right" does not establish that they have an entitlement to their prior, subjective understanding of the law. See MCL 400.1b(2) ("The inclusion of a program in this act [i.e. MCL 400.1 *et seq*] does not create an entitlement to that program. . . ."). This because a property interest in receiving government-paid, public benefits remains subject to state and federal law, such as the enactment of MCL 400.112g *et seq*. See *Kapps v Wing*, 404 F3d 105, 115-116 (CA 2, 2005) (an applicant may have a property right to public benefits only if the applicant meets

statutory criteria); see also 42 USC 1396a(a)(8) (Medicaid "shall be furnished . . . to all eligible individuals.").

In other words, there is no property right to be immune from legislative changes governing the conditions attached to public benefits because "[p]roperty interests, of course, are not created by the Constitution. Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." *Bd of Regents of State Colleges v Roth*, 408 US 564, 577 (1972).

According to *Roth*, the property-right dimensions of Medicaid benefits are defined by the statutory act creating them. MCL 400.112k (the statute creating them) provides that "[t]he Michigan medicaid estate recovery program shall only apply to medical assistance recipients who began receiving medicaid long-term care services after [September 30, 2007]." Likewise, MCL 400.112g provides that recovery is pursued against an individual's estate. MCL 400.112g(1), (3)(d). And "[e]state" means property subject to probate under the Estate and Protected Individuals Code (EPIC), MCL 700.1101 *et seq*. MCL 400.112h(a).

To be protected by the Due Process Clause a property interest must be a vested right. *General Motors Corp v Dep't of Treasury*, 290 Mich App 355, 370 (2010). This Court has explained that "[t]o have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim

of entitlement to it." *Williams v Hofley Mfg Co*, 430 Mich 603, 610 (1988), quoting *Roth*, 408 US at 577.[4]

The decedents here did not have a vested property right; at most, they had a unilateral expectation that the statutory requirement of estate recovery that was impending might be further delayed. But a person does not obtain a vested right to a prior version of the law simply by receiving benefits under the prior version. See *Landgraf v USI Film Products*, 511 US 244, 270 (1994) ("If every time a man relied on existing law in arranging his affairs, he were made secure against any change in legal rules, the whole body of our law would be ossified forever.") (citation omitted). The decedents may have hoped or believed that the prior practice of no recovery would continue to apply to them such that they could provide inheritances to their heirs. See *United States v Carlton*, 512 US 26, 33–34 (1994) ("[E]ntirely prospective change in the law may disturb the relied-upon expectations of individuals, but such a change would not be deemed therefore to be violative of due process."). But a vested right cannot be premised on an expectation that general laws will continue . . . ." *GMAC LLC v Dep't of Treasury*, 286 Mich App 365, 378 (2009). And given the express commands in both state and federal law that estate recovery had to be implemented, it would be an objectively unreasonable expectation for the decedents

[4] Contrary to the Court of Appeals' assertion, the Department did not argue that "upon a decedent's death, his or her property rights extinguished," or that the due process claim is merely extinguished at death. *Gorney*, slip op at 8-9 (opinion of the Court). Rather, the Department argued that the decedents were not deprived of a vested property interest, and even if they were, the Department complied with procedural due process. E.g. Docket No. 323090, Department's Br, 11/26/14, at 21.

to expect that they would receive Medicaid benefits that were not subject to estate recovery.

Their subjective belief of the law does not mean the decedents had a vested right to receive Medicaid benefits on their own terms until notice the acknowledgment was provided or the state plan was approved because "[i]t is the general rule that that which the legislature gives, it may take away." *Lahti v Fosterling*, 357 Mich 578, 589 (1959); see also *In re Kurzyniec Estate*, 207 Mich App 531, 538 (1994) (recognizing that the Department is free to change its policy to comply with state and federal law). Significantly, before estate recovery was enacted, there was no law or policy providing that benefits would not have to be repaid. Rather, the Department's policy simply did not count the value of a beneficiary's homestead (up to $500,000 as adjusted) for purposes of eligibility. Bridges Eligibility Manual (BEM) 400, pp 31-32.

In *Atkins v Parker*, 472 US 115 (1985), the U.S. Supreme Court addressed changes to federal law governing food-stamp benefits, which "provided that 20 percent of the household's earned income should be deducted, or disregarded, in computing eligibility." *Id.* at 118. In 1981, Congress reduced that deduction, which resulted in a decrease or termination of public benefits for some individuals currently receiving benefits. *Id.* In rejecting a due-process challenge made by current food-stamp recipients, the Court explained that "Congress had plenary power to define the scope and the duration of the entitlement to food-stamp benefits, and to increase, to decrease, or to terminate those benefits based on its

appraisal of the relative importance of the recipients' needs and the resources available to fund the program." *Id.* at 129. "The procedural component of the Due Process Clause does not 'impose a constitutional limitation on the power of Congress to make substantive changes in the law of entitlement to public benefits.'" *Id.* Rather, the legislature remained free to modify the benefits it provided: "*the existing property entitlement did not qualify the legislature's power to substitute a different, less valuable entitlement at a later date.*" *Id.* (emphasis added); see also *id.* ("As we have frequently noted: '[A] welfare recipient is not deprived of due process when the legislature adjusts benefit levels . . . .'") (alterations in original); see also *Richardson v Belcher,* 404 US 78, 81 (1971) (explaining that procedural due process does not "impose a constitutional limitation on the power of Congress to make substantive changes in the law of entitlement to public benefits."); *City of Detroit v Walker*, 445 Mich 682, 699 (1994) ("a mere expectation as may be based upon an anticipated continuance of the present general laws" is not a vested right).

Medicaid benefits that must be repaid are undoubtedly a "less valuable entitlement[,]" *id.*, than pre-2007 benefits not subject to estate recovery. But like the food-stamp reduction in *Atkins*, our Legislature had plenary power to define the scope of Medicaid long-term care benefits to comply with federal law mandating estate recovery. 42 USC 1396a(a)(18) (all states participating in Title XIX must have a state plan that complies with estate recovery). Although the Legislature previously did not collect from a recipient's estate, at the threat of the federal government stopping all federal funding for Michigan's Medicaid program, in 2007

the Legislature ended the era of providing long-term care benefits without recovery when it enacted MCL 400.112k. See Senate Legislative Analysis, SB 374, September 28, 2007 ("*Michigan's Federal Medicaid share (over $5 billion annually) could be jeopardized if estate recovery is not implemented.* The Federal government has communicated to the State its intention to begin making use of this [penalty] for FY 2007-08 if estate recovery is not enacted.") (emphasis added).

The Legislature did identify certain instances when the Department shall not recover assets from a recipient's home, such as when the recipient's blind child or disabled child resides in the home. E.g., MCL 400.112g(6). But in MCL 400.112g(5) and (7), the Legislature did not so limit recovery to benefits received after federal approval (i.e., after May 23, 2011) or after recipients received individual notification (as opposed to notification by statute) of estate recovery.

But again, unlike the current recipients in *Atkins*, the four decedents here had not even applied for long-term care benefits when the Legislature changed the scope of these benefits through enacting estate recovery, and even the pre-2007 benefits "did not include any right to have the program continue indefinitely at the same level." *Atkins*, 472 US at 129; see also *Jones v Reagan*, 748 F2d 1331, 1338–1339 (CA 9, 1984) (property right to free medical care for permanently disabled seamen does not create vested property right to benefits when statute authorizing them is amended or repealed). If there is no due-process right even for *current* recipients, the prospective recipients here can hardly complain of a due-process violation when the program changed before they ever applied for benefits.

This is no different than a taxpayer arranging his or her affairs only to have the Legislature subsequently eliminate a tax exemption. *In re Request for Advisory Opinion Regarding Constitutionality of 2011 PA 38*, 490 Mich 295, 324-325 (2011) (tax exemption statutes do not create rights that exist in perpetuity that cannot be later altered by the Legislature); *Gillette Commercial Operations N Am & Subsidiaries v Dep't Of Treasury*, 312 Mich App 394, _ (2015); slip op at 25 (no due-process violation by Legislature retroactively rescinding tax formula because Compact did not guarantee formula would not be altered).

The devastating impact of the Court of Appeals' holding is that the Legislature would be prohibited from altering the parameters of the Medicaid or estate-recovery programs unless it provides advance *individualized* notice of these changes before individuals apply for benefits. For example, if the Legislature amends MCL 400.112h in 2017 and subjects non-probate property to estate recovery, then under the court's due-process analysis, the Legislature would have thus deprived the Medicaid recipient's property right to use non-probate transfers to bypass estate recovery. This is true even if they enrolled in 2018 because the recipient may have already arranged their affairs based on prior law. The Court of Appeals, however, cites no caselaw for creating such an extreme property right.

Accordingly, this new right created by the Court of Appeals is in reality a right to continue to receive Medicaid benefits indefinitely without estate recovery—a right that, if real, would deprive the Legislature of any authority to change Medicaid benefits in the future. This Court, however, has repeatedly rejected rights

of that nature. E.g., *Rookledge v Garwood*, 340 Mich 444, 457 (1954) ("There can, in the nature of things, be no vested right in an existing law which precludes its change or repeal," quoting *Harsha v City of Detroit*, 261 Mich 586, 594 (1933)); *City of Detroit v Walker,* 445 Mich 682, 699 (1994) ("a mere expectation as may be based upon an anticipated continuance of the present general laws" is not a vested right); see also *Cona v Avondale Sch Dist*, 303 Mich App 123, 137-138 (2013) (public school teacher only had expectancy interest in continuation of the standard applied to dismissal because Legislature amended the statute providing a different standard).

Because laws surrounding public benefits are subject to change, even seeking recovery for services provided before individualized notice occurred does not violate due process since there is no vested right to a prior version of the law. In *United States v Carlton*, 512 US 26 (1994), the U.S. Supreme Court addressed a due-process challenge to retroactive application of an amendment to a federal tax law. *Id.* at 30. The taxpayer relied on a 1986 tax law to take advantage of certain deductions, but Congress amended the law in 1987 and applied that provision retroactively to 1986 transactions. *Id.* at 31-33. The Court rejected the due-process challenge because it held that there is no vested right in the continuation of any specific tax statute. *Id.* at 33-35.

Moreover, any perceived right to receive all the benefits of Medicaid long-term care while retaining the right to dispose of property as an inheritance is not a vested right because EPIC provides that "[a]n individual's power to leave property by will and the rights of creditors, devisees, and heirs to his or her property, are

subject to the restrictions and limitations contained in this act to facilitate the prompt settlement of estates. . . ." MCL 700.3101. This section further explains that the decedent's ability to dispose of one's property has limitations. All probate property is "subject to homestead allowance, family allowance, and exempt property, to *rights of creditors*, to the surviving spouse's elective share, and to administration." MCL 700.3101 (emphasis added). Because the decedents' right to leave their property to their heirs at death remains subject to the rights of creditors, such as the Department, the decedents merely had an expectation to provide an inheritance. MCL 700.3101; MCL 700.3805(1)(f).

Furthermore, the estates' constitutional attacks against estate recovery on procedural due process grounds are uprooted by federal law. Under 42 CFR 431.220(b), the state "need not grant a hearing if the sole issue is a *Federal or State law requiring an automatic change adversely affecting some or all beneficiaries*." (Emphasis added); (42 CFR 431.211 (provide notice 10 days before date of intended action); 42 CFR 431.201 ("Action" means "termination, suspension, or reduction of Medicaid eligibility or covered services.")). These decedents' benefits were not terminated or reduced without a hearing. Because MCL 400.112g-400.112k automatically changed the rights of all recipients enrolling in long-term care after September 30, 2007, there was no obligation to provide a hearing.

Regardless of federal law "the estate[s] w[ere] personally apprised of the Department's action seeking estate recovery, and [they] had the opportunity to contest the possible deprivation of its property in the probate court. [They] received

both notice and a hearing, which is what due process requires." *Keyes*, 310 Mich App at 392. Each estate disallowed the Department's claim and fully litigated that issue before the probate courts. They received all the process that was due. *Bonner*, 495 Mich at 238 ("[D]ue process was satisfied by giving plaintiffs the right to an appeal before the city council and the opportunity to appeal that decision to the circuit court.").

In sum, the Legislature modified the terms surrounding the receipt of Medicaid benefits so as to require estate recovery, which it could do without offending due process because the decedents had no vested right to continue to receive benefits free from estate recovery.

C. MCL 400.112g(5) does not allow individuals to receive public benefits without estate recovery applying to them.

Despite the foregoing, the *Gorney* court concluded that MCL 400.112g(5) provides that the decedents had a due-process right to receive long-term care benefits without recovery until federal approval was obtained. The court asserted a novel property right: the right "to elect whether to accept benefits and encumber [one's] estate[ ], or whether to make alternative healthcare arrangements." *Gorney*, slip op at 9-10. According to the *Gorney* Court, "[b]etween July 1, 2010, and July 1, 2011, the date on which the plan was actually "implement[ed]," *the decedents lost the right to choose how to manage their property*." *Gorney*, slip op at 10 (opinion of the Court and emphasis added). "Taking their property to recover costs expended

between July 1, 2010 and plan implementation would therefore violate the decedents' rights to due process." *Id.*

As already explained, this analysis rests on several flawed premises.[5] First, it ignores the fact that the decedents should have known by 2007 (before any of them first applied for the benefits) that any benefits they accepted would, by requirements of both state and federal law, eventually be subject to estate recovery. In other words, they had the right to choose at the time they first applied (and with each subsequent renewal), and they exercised that choice by enrolling. Second, it transforms a *hope* that pre-2007 benefits levels would continue in perpetuity into a vested property *right*, contrary to well established law. In short, it does not offend due process for the Department to seek recovery for benefits from the date the state plan was effective (July 1, 2010) because there is no right to evade legislative changes to public benefits.

Accurately defining the decedents' interest as a mere expectation, not a vested property right, reveals the flaw in the Court of Appeals' attempt to ground a due-process violation on when estate recovery was actually implemented. MCL 400.112g(5) does not provide that individuals may continue receiving all the benefits of long-term care without recovery until the Department implemented an

[5] To aid in its due-process analysis, the Court of Appeals relied on *In re Estate of Burns*, 928 P2d 1094 (Wash, 1997). *Gorney*, slip op at 10 (opinion of the Court). But *Burns* is not a due-process case: "We do not reach the Estates' remaining arguments regarding due process and the contract clause." *Burns*, 131 Wash 2d at 120.

approved state plan. Such an interpretation directly contradicts the federal mandate for estate recovery. 42 USC 1396p(b).

MCL 400.112g(5) provides that the Department "shall not implement a Michigan medicaid estate recovery program until approval by the federal government is obtained." The plain language of MCL 400.112g(5) does not limit the amount of recovery to post-implementation benefits. Under the Court of Appeals' interpretation, MCL 400.112g(5) is redlined to provide that the Department "shall not implement a Michigan medicaid estate recovery program until approval by the federal government is obtained *and shall only collect amounts subject to estate recovery that are paid after the approval date*." By effectively inserting this italicized language, the Court of Appeals created a due-process right to receive benefits without recovery when it concluded that MCL 400.112g(5) limited recovery to benefits paid after the federal government approved the state plan for estate recovery. *Roberts v Mecosta Co Gen Hosp*, 466 Mich 57, 66 (2002) ("The role of the judiciary is not to engage in legislation.").

Likewise, reading this statute in such a way contradicts *Roth*'s dictates that a property right is defined by state law. The court's flawed interpretation ignores that there are other statutory provisions governing the amount of recovery, and so violates the principle that statutes must be examined as whole and cannot be read in isolation. *Keyes*, 310 Mich App at 270. MCL 400.112g(2)(b), for example, requires the Department to establish activities of the estate recovery program, including in part "[a]ctions necessary to *collect amounts subject to estate recovery for*

medical services as determined according to subsection (3)(a) provided to recipients identified in subsection (3)(b)." (Emphasis added).

But MCL 400.112g(3)(a) and (b) do not restrict estate recovery to those benefits paid after federal approval and implementation of the state plan—i.e. July 1, 2011. Significantly, federal law does not contain any such limitation but mandates that "the State shall seek adjustment or recovery of *any medical assistance correctly paid* on behalf of an individual under the State Plan . . . ." 42 USC 1396p(b) (emphasis added); see also 42 CFR 447.256 (effective date for state plan is first day of calendar quarter submitted). And the acknowledgement (addressed more below) informs the decedents that the Department will seek recovery for all services paid by Medicaid; there is no qualifier limiting recovery to post-acknowledgement or post-implementation benefits.

Lastly, the Department collecting from the effective date of the state plan does not involve retroactivity—it merely confirms an obligation that already existed as of September 30, 2007, under MCL 400.112k, and that applied prospectively from that point on. See *Landgraf*, 511 US at 270 n 24 ("Even uncontroversial[] prospective statutes may unsettle expectations and impose burdens on past conduct . . . a new law banning gambling harms the person who had begun to construct a casino before the law's enactment . . . ."); *Gillette*, 312 Mich App _; slip op at 25 (retroactive impact on numerous taxpayers of State withdrawing from Multistate Tax Compact does not violate due process because there is no vested right in continuation of that law). Had the Department sought to recover *before* September

30, 2007, the court's due-process analysis might have some merit. But that is not the case here.

The Court of Appeals misinterpreted MCL 400.112g(5) as estate recovery being applied retroactively to restrict recovery to post-implementation benefits. But MCL 400.112g(5) does not so limit recovery to post-implementation benefits.

D. Recovery for benefits also does not offend due process because the decedents voluntarily subjected their estates to recovery.

Regardless of the statutory changes, each of these decedents elected to continue receiving Medicaid benefits after receiving an individualized notice that their estates would be subject to recovery. They elected to let their property pass through probate upon their death. And each of these estates argue only that estate recovery should not apply to them because the decedents were deprived of an individualized notice of how estate recovery applied to them; they do not contest the procedures involved. (Appellant's Appendix, pp 48a-50a; 95a-96a, ¶¶ 17-18; 215a-218a; 273a.)

After these decedents began receiving Medicaid long-term care, the decedents, or their representative, signed a DHS-4574 form for their annual redetermination to evaluate whether they continued to be eligible for long-term care. (Appellant's Appendix, pp 36a ¶ 19; 112a ¶¶ 3-4; 115a ¶¶ 6-7; 175a ¶¶ 4-5; 180a ¶¶ 6-7; 279a ¶ 7.) Both state and federal law requires individuals to annually seek eligibility by making a re-application for Medicaid long-term care. Bridges Administrative Manual 210, p 2 (benefits stop at the end of the benefit period

unless redetermination is completed), attached as Appellant's Appendix, p 124a; see also 42 CFR 435.916(a)(1). By signing this redetermination application, these four decedents elected to continue receiving benefits while also signing the following acknowledgment: "I understand that upon my death the Michigan Department of Community Health has the *legal right to seek recovery from my estate for services paid by Medicaid*." *Gorney*, slip op at 4 (opinion of the Court; emphasis added).

Even after receiving the above individualized notice, the decedents failed to take any other steps to "maintain their estates" or "to dispose of their property." *Id.*; slip op at 9-10. Each of these decedents could have exploited some Medicaid "loopholes" to avoid probate and reap a windfall for their heirs. See Michigan Land Title Standards (6th ed), 9.3; see also Frank, *Ladybird Deeds: Purposes and Usefulness*, 95 Mich B J 30, 32 (June 2016) ("Before or after qualifying for Medicaid benefits, the [recipient] can execute and record the ladybird deed. The deed is a transfer-on-death document; therefore, the property does not become part of the probate estate, which currently exempts the property from Medicaid recovery proceedings."). A ladybird deed is one such practice regrettably available to Medicaid beneficiaries who desire to pass on inheritances at the taxpayers' expense. See *Mackey v Dep't of Human Services*, 289 Mich App 688, 697 (2010) (field of Medicaid planning is similar to the way one exploits the Internal Revenue Code to take advantage of tax laws). But they did not take any such steps to maintain their estates, although they were able to do so.

Consequently, the estates cannot complain of a constitutional deprivation when the decedents voluntarily chose to remain subject to recovery by accepting benefits and failing to "maintain their estate" after receiving the notice. See *AFT Michigan*, 497 Mich at 225-226 (individuals receiving government benefits may voluntary waive their constitutional rights). It is only the decedents' heirs that objected to estate recovery because it reduces their inheritances. MCL 700.3805. The decedents themselves did not complain about their estates being subject to recovery while Michigan's taxpayers were paying for the costs of their long-term care. See e.g. Appellant's Appendix, p 38a ¶ 32; 112a-113a ¶ 8-11; 177a ¶ 7-9.

The Court of Appeals' concerns about unfairness are unfounded, considering that all of the decedents elected to continue receiving Medicaid long-term care knowing that their estates would be subject to recovery via the acknowledgment and that they subsequently failed to "maintain their estates."

E. Pursuing estate recovery and preventing the loss of federal funding for Michigan's Medicaid program does not violate substantive due process because it is rationally related to a legitimate government purpose.

The Due Process Clause "encompass[es] a substantive sphere as well, 'barring certain government actions regardless of the fairness of the procedures used to implement them.'" *Bonner*, 495 Mich at 225 (citation omitted). This is to prevent "the arbitrary exercise of governmental power." *Id.* at 223-224. "Legislation is presumed to be constitutional absent a clear showing to the

contrary[,]" *AFT Michigan,* 497 Mich at 214, and the individual challenging the law bears the burden of proof. *Bonner*, 495 Mich at 229.

This Court has recognized that substantive due process must be applied with great care: the analysis "'must begin with a careful description of the asserted right,' for there has 'always been reluctan[ce] to expand the concept of substantive due process' given that '[t]he doctrine of judicial self-restraint requires us to exercise the utmost care whenever we are asked to break new ground in this field.'" *Id.* at 226-227 (citations omitted). And as illustrated above, the asserted property right here is to receive all the benefits of government-paid, public benefits without having to repay them in order to provide an inheritance. This purported right to maintain one's estate, however, is not absolute such that the Legislature is divested of authority to modify the right.

In examining any such right, this Court has set forth the appropriate test:

> If a challenged law does not infringe any "fundamental rights"—the substantive liberties that are deemed "implicit in the concept of ordered liberty"—this Court has stated that to prevail on a claim of a violation of "substantive" due process, the plaintiff must prove that the challenged law is not "reasonably related to a legitimate governmental interest." [*AFT Michigan,* 497 Mich at 245.]

Here, the asserted right is at best to be exempt from statutory changes to government-paid, public benefits before one ever applies for those benefits. The estates do not allege that this is a fundamental right. (Appellant's Appendix, pp 25a-26a; 49a; 104a; 152a; 173a ¶ 16.) Rather, the estates assert a generic unfairness argument that the decedents were so unaware of estate recovery that they would have rejected Medicaid coverage so they could provide an inheritance for

their children—a notion belied by the decedents' failure to maintain their estate after receiving the acknowledgments. This is not a fundamental right. See *Bonner*, 495 Mich at 228-229 (no fundamental right to repair real property deemed unsafe by government entity); *AFT Michigan*, 497 Mich at 247 (public school employees do not have a fundamental right for retiree healthcare); see also *DeShaney v Winnebago Co Dep't of Social Services*, 489 US 189, 196 (1989) (due process confers no affirmative right to governmental aid); *Doe v Dep't of Social Services*, 439 Mich 650, 678 (1992) (the Legislature is not obligated to fund the exercise of a right, and may eliminate benefits previously offered).

Accordingly, to prevail on rational basis, the estates "must surmount the exceedingly high hurdle of demonstrating that the law is altogether *unreasonable*." *AFT Michigan*, 497 Mich at 248 (emphasis in original). "The legislation will pass 'constitutional muster if the legislative judgment is supported by any set of facts, either known or which could reasonably be assumed, even if such facts may be debatable.'" *TIG Ins Co, Inc v Dep't of Treasury*, 464 Mich 548, 557 (2001), quoting *Crego v Coleman*, 463 Mich 248, 260 (2000)).

In *AFT Michigan*, this Court addressed whether a legislative amendment regarding current public school employees' healthcare and retirement benefit plans violated substantive due process. Under the amendment, current public school employees may opt out of retiree healthcare or have their salary be subject to a 3% contribution for retiree healthcare cost. *AFT Michigan*, 497 Mich at 205-206. That amendment also increased the amount current public school employees' contribute

for their pension benefits, which was a new financial obligation for some employees. *Id.* at 206-207. In rejecting a substantive-due-process challenge, this Court found a legitimate government purposes in implementing a "fiscally responsible system" to fund the rising costs borne by Michigan's taxpayers. *Id.* at 247. The legislation was reasonably related to this purpose

> because the Legislature has deemed it *fiscally untenable for the state to place the entire burden of providing these benefits on the taxpayer*, it is also reasonable that the state would choose to have current public school employees assist in contributing to the costs of this program. If the state requires additional financial support to maintain the public school employees' retiree healthcare system, which class of persons is more appropriate to assist in maintaining the fiscal integrity of this program than the participants themselves? *We do not believe that the state or federal Constitutions require Michigan taxpayers to fund the entire cost of a retirement benefit for a discrete group of public employees.* [*Id.* at 247-248 (emphasis added).]

Like the current public school employees in *AFT Michigan*, the Legislature found it "fiscally untenable for the state to place the entire burden of providing these benefits on the taxpayer[,]" *id.*, and risk the loss of federal funding for Michigan's entire Medicaid program. Federal law requires all states to collect any Medicaid correctly paid, 42 USC 1396p(b), or forfeit all federal funding for Medicaid. 42 USC 1396c; see *Nat'l Federation of Indep Businesses v Sebelius*, _ US _; 132 S Ct 2566, 2607 (2012) ("Section 1396c [42 USC 1396c] gives the Secretary of Health and Human Services the authority to . . . withhold *all* 'further [Medicaid] payments ... to the State' if she determines that the State is out of compliance with any Medicaid requirement . . . ." (emphasis in original)).

This federal threat is buttressed with the undisputable fact that "the cost of providing Medicaid benefits has continued to skyrocket." *Mackey*, 289 Mich App at

693. Thus, it is entirely reasonable for the Legislature to enact estate recovery and recover as soon as the state plan was deemed effective to avoid the loss of federal funding for the Medicaid program and ensure that the program and public assistance continues to remain available for low-income individuals.

But the due-process challenge here is noticeably less invasive from the one involved in *AFT Michigan*. Unlike current public school employees, the decedents here were not currently part of the Medicaid program when the Legislature altered the conditions attached to receiving benefits. *AFT Michigan*, 497 Mich at 214-215. Current public school employees expected that they would continue receiving the previous level and quality of employment benefits they bargained for and relied upon in accepting employment. *Id.* That alone, however, does not create a constitutional deprivation when scope of the benefits are prospectively changed by legislation. *Id.* As this Court explained, "all public employees *must contend with a variety of future uncertainties, of which they are, or should be, aware at the time that they pursue and accept public employment*." *Id.* at 215 (emphasis added). "The terms, conditions, and even continued existence of public employment positions may be influenced by the changing fiscal conditions of the state, the evolving policy priorities of governmental bodies, constitutional modifications and other initiatives of the people, and the ebb and flow of state, national, and global economies." *Id.*

Because of the nature of government-paid, public benefits, these four decedents should have been aware at the time they enrolled that the terms or conditions may be altered in some way. This is even more so because of the

legislative enactment of estate recovery, and the federal government has mandated estate recovery since 1993. They were even personally notified about estate recovery before their death. In sum, the Legislature had a legitimate purpose for pursuing estate recovery, and estate recovery was implemented consistent with federal and state law.

II. The Legislature authorized the Department to make the determination of whether the cost of recovery is in the best interest of the State, not the courts.

Whether the costs of recovery is in the best interest of the state of Michigan is a matter of agency determination. The courts should not assume policy-making authority over agency determinations absent a clear legislative directive.

At the outset, the Court of Appeals noted "that the probate court did not consider this issue on the record and the estate's appellate argument is cursory. The statutes provide no guidance on the application of MCL 400.112g(4)." *Gorney*, slip op at 6. These points (forfeiture by inadequate argument and a lack of judicially manageable standards) should have ended the Court of Appeals' analysis.

Regardless, MCL 400.112g(4) is not subject to judicial determination. MCL 400.112g(4) provides that the Department "shall not seek medicaid estate recovery if the costs of recovery exceed the amount of recovery available or if the recovery is not in the best economic interest of the state." The primary goal of statutory construction is to ascertain and "give effect to the Legislature's intent as expressed in the words of the statute." *Pohutski v City of Allen Park*, 465 Mich 65, 683 (2002). A court must "apply the language of the statute as enacted, without addition,

subtraction, or modification." *Lesner v Liquid Disposal*, 466 Mich 95, 101-102 (2002).

The plain language requires the Department to evaluate when state resources should be expended to pursue recovery to comply with federal law. But that does not mean the probate courts can second-guess the policy decisions of the Department, such as whether the cost of recovery are justified in a given case or even what costs are appropriate to consider. See *Fieger v Cox*, 274 Mich App 449, 466 (2007) ("Michigan courts recognize that although the judiciary generally may not second-guess executive-branch decisions, under certain circumstances the judiciary does possess limited authority to review discretionary actions taken by the executive branch."). When the Legislature desires for the probate courts to act within a certain area, it does so explicitly. MCL 600.841; MCL 400.115k (adoption subsidy determinations reviewed by probate courts). Nowhere in MCL 400.112g(4) did the Legislature provide that whether recovery is cost-effective is subject to litigation and judicial determination by the probate courts.

By misreading MCL 400.112g(4) this way, however, the Court of Appeals ignores that the Legislature already provided in MCL 400.112j(2) its desired remedy to determine whether the Department is in compliance, namely resolution through the political process in the Legislature:

> Not later than 1 year after implementation of the Michigan medicaid estate recovery program and each year after that, the department of community health shall submit a report to the senate and house appropriations subcommittees with jurisdiction over department of community health matters and the senate and house fiscal agencies *regarding the cost to administer the Michigan medicaid estate recovery*

> *program and the amounts recovered under the Michigan medicaid estate recovery program*. [(Emphasis added).]

But the Court of Appeals proceeded and invited widespread litigation under MCL 400.112g(4) by effectively transferring the estate-recovery mandate over to the courts. Cf. 42 CFR 431.10(e) (single state agency must supervise plan and develop policy relating to programs). Under the Court of Appeals' invitation, personal representatives would be encouraged to use administrative costs, such as escalating attorney fees, as a sword to preserve inheritances and prevent estate recovery. See MCL 700.3805 (administrative costs are paid *before* the Department's claim).

Although the Department's policy provides that whether recovery is cost-effective is subject to the Department's "sole discretion," that does not mean all judicial review is completely foreclosed. See Const 1963, art 6, § 28; MCL 24.306; and MCL 600.631. The Department's actions may be constitutionally challenged if, for example, it pursued recovery against decedents based on their race, gender, or ethnicity. See *Warda v City Council of City of Flushing*, 472 Mich 326, 335 (2005) (even if there is no statutory basis for review, decisions of governmental agencies must still comply with state and federal constitutions). But none of these situations are involved here or even remotely suggested.

In *Warda*, this Court held that the judiciary cannot review discretionary actions by a government agency to reimburse private attorney fees incurred by a government employee. *Id.* at 335. While the statute in *Warda* used the term "may" and MCL 400.112g(4) uses the term "shall," both statutes lack "judicially comprehensible standard[s]" that limits judicial review. *Id.* at 339. "Absent a

comprehensible standard, judicial review cannot be undertaken in pursuit of the rule of law, *but only in pursuit of the personal preferences of individual judges*." *Id.* at 339-340 (emphasis added).

The Court of Appeals, however, states that there are no standards on how the Department evaluates the cost versus benefit of recovery. *Gorney*, slip op at 6 (opinion of the Court). This is incorrect because the state plan provides the Department with guidance: "Recovery is considered cost-effective when the potential recovery amount of the estate exceeds the cost of filing the claim and any legal work dealing with the claim, or if the recovery amount is above a $1,000 threshold." (Appellant's Appendix, p 144a.)

Opening MCL 400.112g(4) up to judicial review will subject estate recovery to the preferences of individual judges. In looking to the first prong regarding the costs of recovery, the statute is silent on what costs may be considered and at what point in time the costs must be evaluated. For example, a distant probate court may require the Department's counsel to travel several hours to appear in-person for a rudimentary, five-minute scheduling conference, thereby increasing the costs of recovery. Another case with the same amount of assets, in a neighboring yet still remote county, may allow the Department's counsel to appear by telephone for such a routine matter, and, therefore, substantially reduce the costs of recovery. Under the Court of Appeals' precedent, however, the Department will be forced to arbitrarily pursue recovery based on the hurdles imposed by the personal preferences of a particular court, not through a uniform policy.

Moreover, it is impossible to know what the costs of recovery are until after probate administration and litigation is completed. This is because the Department's estate recovery claim is paid *after* the personal representative, his or her attorney, or both are reimbursed for any fees and costs incurred in preventing estate recovery. MCL 700.3805(1). The personal representative may end up litigating away all of the estate assets through escalating attorney and personal representative fees such that there is nothing left to recover. If this decision stands, the heirs have nothing to lose by fighting estate recovery. Cf. MCL 700.3703(1) (personal representative owes duty to act in best interest of the estate, including allowed claims).

The danger of the Court of Appeals' holding is that should estates disallow a valid estate-recovery claim to simply increase recovery costs, then the Court of Appeals is directing the Department to simply collapse under the threat of those costs. But if the disallowance is not set aside, the Department faces a permanent bar from *any* recovery pursuant to MCL 700.3804(2)—even for estates that are later reopened for after-discovered assets. MCL 700.3959 ("A claim previously barred shall not be asserted in the subsequent administration."). Here, had Ketchum's estate not summarily disallowed the Department's claim, an all-too-common practice by probate practitioners, there would have been funds available to pay the valid claim. Even after the court granted summary disposition for the estate, there was *at least* $1,000 available to reimburse Michigan's taxpayers.

Lastly, under the second prong, the Legislature did not provide judicially manageable standards for determining when recovery is "in the best economic interest of the state." MCL 400.112g(4). That determination is left to the Department. Given the skyrocketing costs of long-term care, *any* recovery consistent with the state plan may be in the state's best interest because it ensures that public benefits are available for future recipients. Trial courts should not be the gatekeepers by making policy decisions on when it is in the State's best economic interests to pursue recovery. See *Straus v Governor*, 459 Mich 526, 531 (1999) ("We cannot serve as political overseers of the executive or legislative branches, weighing the costs and benefits of competing political ideas or the wisdom of the executive or legislative branches in taking certain actions, but may only determine whether some constitutional provision has been violated by an act (or omission) of the executive or legislative branch."); see also *Koziarski v Dir, Michigan Dep't of Social Services*, 86 Mich App 15, 21 (1978) ("[I]t is not our province to second guess the appropriateness of the manner in which scarce public welfare funds are disbursed.").

In sum, MCL 400.112g(4) does not provide a judicial defense to estate recovery by inviting the trial courts to second guess the Department's determinations on when recovery is in the best economic interests of the state.

CONCLUSION AND RELIEF REQUESTED

Medicaid is a cooperative federal program designed to assist the poor, and any money recovered from a beneficiary's estate fulfills that purpose. The Due

Process Clause did not provide these four decedents with a property right to evade the enactment of MCL 400.112g through MCL 400.112k, which are designed to preserve the limited pool of Medicaid funds for the needy. Because the decedents had notice (both statutory and individualized) and no right in the first place to a continuing level of benefits, no due process violation occurred. Further, whether costs of recovery is in the best economic interests of the state is left to the Department's determination and not subject to judicial second-guessing.

In sum, the Department respectfully requests that this Court reverse the Court of Appeals for the reasons articulated in the dissent.

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